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No. 86-179

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
Appellants,

UNITED STATES OF AMERICA,
Intervenor,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Utah

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REPLY TO MOTION TO AFFIRM

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REPLY TO MOTION TO AFFIRM

The appellees' motion to affirm is devoted almost exclusively to a defense of the District Court's decision on the merits. While we disagree with those arguments, their validity is not the issue at this jurisdictional stage. The one conclusion that is eminently clear from the motion to affirm is that the merits are not only worthy of this Court's review, but review is virtually required.

The appellees necessarily contend in the motion to affirm that the holding below is so clearly correct that the Court does not need briefing and argument on the

merits. That argument fails for two reasons. The first is that this case falls within a narrow category of disputes which Congress itself has determined must be reveiewed by this Court. The second is that, in any event, the issues have far too broad an impact on the nation's churches, and are far too difficult, to leave the District Court's judgment unreviewed.

This case lies squarely within the jurisdiction created by 28 U.S.C. § 1252. Section 1252 contains a congressional determination that the normal course of appellate review—by the courts of appeals—should be bypassed where a District Court has held a federal statute unconstitutional in a proceeding to which the United States is a party. Indeed, Congress not only authorized Supreme Court review of such cases, it fully expected review to occur. For cases within its limited scope, § 1252 virtually eliminates the need for this Court to consider the usual factors in deciding whether to note jurisdiction. In cases such as this one, Congress itself has struck the relevant balance.

Moreover, under any standard, this appeal warrants full review on the merits, as the motion to dismiss implicitly recognizes.

The appellees do not contend, nor could they, that the issues are simple. The issues raised by this case not only lie at the intersection of the religion clauses of the First Amendment; they also involve competing values of the Establishment Clause itself. The respect that this Court has consistently shown to Congress and its policy-making prerogatives requires review of the District Court's judgment that an important federal statute is unconstitutional. This is particularly true where Congress has determined that no other appellate review is available.

The need for review by this Court is even stronger because this dispute involves more than competing constitutional considerations. It also involves the constitutionality

of a pivotal provision of Title VII, which represents Congress' conscientious effort, based on eight years of actual experience, to reach an appropriate accommodation of a difficult constitutional question. Congress' judgment in this respect is of course not determinative; it is the province and duty of this Court finally to determine what the Constitution means.

For reasons discussed in the Jurisdictional Statement and not answered by the appellees, Congress had only three realistic options.[1] The alternative eventually selected is the only one that does not raise serious constitutional questions. If, contrary to Congress' judgment (and, we submit, contrary to the Constitution itself), a vast range of Title VII cases involving religious employers is to be resolved by judicial inquiry into such matters as which beliefs and practices of this nation's churches qualify as genuinely religious, and whether church employment practices make a sufficient contribution to the achievement of religious objectives, such an obvious entanglement should not be permitted without careful consideration by this Court. We note in this regard that the appellees attempt to educate the Court concerning what they regard as basic precepts of Mormonism. They assert, for example, that the church believes there is no rigid separation between things temporal and things eternal. We agree that the approach shared by the District Court and the appellees requires courts to determine the content of Church doctrine, and whether its precepts are more closely linked to the operation of a welfare program than they are to the manufacture of religious garments or the operation of a gymnasium. That kind of endeavor is non-judicial, substantively fruitless, and squarely at odds with Establishment Clause values as consistently declared and protected by this Court. Yet it is precisely this problem that lies at the very heart of the District Court's holding and the appellees' argument.

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[1] See Jurisdictional Statement, p. 10, n.8.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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